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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 15

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 237)[1] is reported at 333 F. 2d 654. The opinion of the Federal Trade Commission (R. 40-66) is reported at 60 F.T.C. 1845. The initial decision and order of the hearing examiner (R. 20-38) are reported at 60 F.T.C. 1830.

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[1] "R." refers to the printed record herein, "CX" refers to Commission exhibits, and "RX" refers to Mary Carter exhibits.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (R. 249). On September 17, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 15, 1964, and on October 14, 1964, he further extended the time for filing to and including October 26, 1964. The petition was filed on the latter date and was granted on January 18, 1965 (R. 252; 379 U.S. 957). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

QUESTION PRESENTED

Whether the Federal Trade Commission exceeded its authority in holding it to be an unfair or deceptive act or practice, violating Section 5 of the Federal

Trade Commission Act, for a seller regularly to advertise that the purchaser of a single unit at its represented regular price will receive a second unit "free," when in fact the stated price has always been the seller's regular price for two units.

STATEMENT

The essential facts are undisputed. Respondent Mary Carter Paint Company ("Mary Carter") manufactures paint and sells it to the public through more than 500 retail outlets (which are wholly-owned) and through franchised dealers located in 28 eastern and southern States (RX 2, R. 149, 152-153, 157). In 1960, its sales totaled $12,000,000 (R. 22).

From the time it began business in 1951, Mary Carter, as an established and permanent policy, has advertised that for every can of paint purchased it will give the purchaser a "free" can of equal quality and quantity (RX 2, R. 158-159; R. 124). Examples of such advertising are:

> "Buy one get one FREE" (RX 23, R. 199; CX 29, R. 208).
>
> "Every 2nd Can FREE of Extra Cost" (CX 2, R. 200; CX 8, R. 204).
>
> "Buy only half the PAINT YOU NEED!" (CX 5, R. 202).
>
> "ACRYLIC ROL-LATEX * * * $2.25 qt. $6.98 gal. Every 2nd Can Free" (CX 41, R. 213; CX 45, R. 215).

Many different varieties of Mary Carter paint are advertised at $2.25 per quart or $6.98 per gallon

(*e.g.*, CX 45, R. 215; CX 47, R. 216; CX 49, R. 218). A purchaser buying paint at this price receives two quarts for $2.25 or two gallons for $6.98.

The policy of the company is to charge the advertised price whether or not the purchaser takes the "free" can (R. 70, 146-147). If a purchaser wants only one gallon, he may buy two quart cans at $4.50 and receive two quarts "free," thus paying $4.50 for a gallon of paint. Purchasers paying $4.50 for four guarts sometimes were given gallon cans (R. 33, 77; CX 67, R. 223, 231-232).

On February 15, 1961, the Federal Trade Commission issued a complaint against respondent Mary Carter charging that its advertising was false and misleading, in violation of Section 5 of the Federal Trade Commission Act (R. 5-9).[2] After full administrative proceedings the Commission (Commissioner Elman dissenting) held that Mary Carter had engaged in misleading advertising, and issued a cease-and-desist order (R. 37-38, 40-66). The Commission stated that although there had been a "few isolated instances" where a purchaser paid the unit price but took only one can of paint, Mary Carter "usually and customarily" had "sold two cans of paint for the so-called single can price"; and it agreed with the examiner's finding "that the amount designated in respondents' advertising as the price for a can of Mary Carter paint is not the usual and regular price per

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[2] The complaint also named as respondents three individuals who were at the time, or had been, officers of Mary Carter. The complaint was dismissed against two of them (R. 22-23, 38). We shall refer to Mary Carter as respondent.

single can but the usual and regular price for two cans" (R. 46; see R. 36-37, 41). The Commission further held (R. 43-48) that neither its previous decisions nor any one of its Guides Against Deceptive Pricing justified Mary Carter's deceptive advertising. The Commission also sustained the examiner's ruling excluding evidence offered by Mary Carter to show the quality of its paint as irrelevant to the issue whether its advertising was deceptive (R. 48).

The Commission's order directed Mary Carter to cease and desist from representing (a) that the price of a product is "respondents' customary and usual retail price" when that price is greater than the price "at which such merchandise is customarily and usually sold by respondents at retail," and (b) that an article is being given free "or without cost or charge, when such is not the fact" (R. 37-38).

The court of appeals set aside the Commission's order and ordered the complaint dismissed (R. 237-248). The court, "adopt[ing] and approv[ing] the reasoning and the result" in Commissioner Elman's dissenting opinion (R. 243), held that the Commission had failed to explain what was unfair or deceptive about Mary Carter's advertising, and had departed from its previous decisions governing the use of the word "free" in advertising. The court further ruled that the cease-and-desist order was impermissibly vague.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent conceded before the hearing examiner that a large measure of the success of its advertising

program is attributable to its use of the word "free" to describe every second can of paint it offers for sale (R. 22). The obvious effectiveness of that word as a sales device is demonstrated not only by respondent's experience, but also by the readily observable fact that—as Commissioner Elman noted—"[i]t is, and has long been, commonplace in the United States for merchandise to be advertised and sold at a stated price, with another article, or installation or service, or an incidental part or accessory, included 'free' * * *" (R. 51).

When a product or service is offered "free" on the condition that some other product or service is purchased, the "tied" commodity is obviously not "free" in a strict literal sense—*i.e.*, the consumer is not getting it totally without cost nor is the manufacturer or distributor giving it away without some recoupment of its expense out of the added profits from increased sales. The word "free" in this context must be given a relative definition—the combination includes a "free" premium because it does not cost more than the "tying" product or service costs separately. In this sense the word "free" has become a part of contemporary merchandising. It communicates to the public that a manufacturer or distributor is offering some particular incentive to purchase which is a *bona fide* benefit to the consumer.

Implicit in the announcement that the premium is being offered "free" is the representation that the purchaser is being required to pay no more for the "tying" product than he would have had to pay ab-

sent the offer. If a manufacturer were to add to the ordinary sales price of a "tying" product part or all of the cost of a "free" premium, he would obviously not be offering the premium "free." The same would be true if he were to reduce the usual quantity or quality of the tying product in order to offset the extra cost of the "free" product or service. Consequently, the Commission announced in *Walter J. Black, Inc.*, 50 F.T.C. 225, 235-236, the principle that the word "free" may not be used to describe a product whose purchase is conditional on the purchase of another if the latter's ordinary price has been increased or its usual quality or quantity decreased for the duration of the offer.

The present case admittedly involves no violation of the standard established in the *Black* case because it concerns a product which had no "ordinary" price or "usual" quality or quantity other than under the terms of the challenged offer. In other words, the question in this case is whether a product or service may be labeled "free" if it may be obtained only upon the purchase of another product or service which neither has nor is expected to have any regular or usual sale price independent of the tied product.

The disagreement between the majority of the Commission on the one hand and a majority of the court of appeals [3] and the dissenting Commissioner on

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[3] Judge Brown concurred on the ground that respondent had been the victim of "individualized discrimination" because the Commission departed from the standard announced in the *Black* case (R. 247-248). For reasons stated at pp. 25-33, *infra*, we believe that this case involved no departure from *Black*.

the other turns, in our view, on whether the sort of benefit here being offered by respondent—if it is a benefit at all—can fairly be described as a "free" offer. The Commission was of the view that since "the amounts designated by respondents in their advertising as the price per single can of Mary Carter paint has [sic], in fact, been the usual and regular price of two cans of such paint * * *" (R. 48), it is deceptive for respondent to call any can "free." A majority of the court of appeals, however, rejected the conclusion that the word "free" had been deceptively used (R. 242). We submit that respondent's advertisement is deceptive because (1) it misrepresents to consumers what the usual price of respondent's paint is and (2) it confuses consumers by calling a simple price advantage a "free" offer.

When respondent advertises that it is offering a "free" can with every can that is purchased, consumers are led to believe that the offer is for a limited time only, and that respondent's product has ordinarily sold (and will sell in the future) at the advertised price for each single can. In other words, respondent represents to potential purchasers that whereas they may now purchase two gallons for $6.98, the usual price for that quantity of paint is $13.96. That representation is false, and it is material because it induces purchases which might not otherwise be made.

Even if no "limited time" implication were lurking in respondent's advertisements, they would still be deceptive because they use the word "free" in a misleading manner. The only meaningful sense in which a

product "tied" to the purchase of another product or service may be called "free" (assuming that the quality and quantity of the latter remains identical) is when the price is no greater for the package than for the identical "tying" product alone. When, as here, the "tying" product has no ordinary price independent of the package, a premium offered with it cannot fairly be called "free." Since what is being compared is the price of the product being sold with the price of a competitor's product represented as being of equal quality, the most that can be said accurately is that the former is "cheaper" or "lower in price" than the latter.

The Commission explained in its opinion that it considered respondent's advertisement deceptive because, unlike prior cases in which the Commission had permitted use of the word "free," there was, in the present case, no "established" or "usual and customary" retail price for the "tying" product—*i.e.*, a single one-gallon can of respondent's paint. The Commission found that the only "established" price was for the package—*i.e.*, two one-gallon cans of paint.

The Commission's ruling in this case was consistent with its earlier precedents—particularly the decision in *Walter J. Black, Inc.*, 50 F.T.C. 225, where it announced certain rules regarding use of the word "free" in combination offers. The rules announced in the *Black* case were not intended to be exclusive; they apply only to the situation in which the "tying" product has an independent "established" or "usual and customary" retail price. Commission decisions since

Black, as well as the Commission's announced Guides Against Deceptive Pricing, make it entirely clear that the Commission was not intending, when it announced the *Black* rules, to sanction a practice like respondent's when no ordinary retail price has been established for the independent sale of the "tying" product.

ARGUMENT

I

RESPONDENT'S "BUY ONE, GET ONE FREE" SLOGAN IS DECEPTIVE

A. THE SLOGAN MISREPRESENTS THE CUSTOMARY PRICE OF RESPONDENT'S PAINT.

The necessary implication of respondent's offer to supply a "free" gallon of paint with every gallon purchased at $6.98 is that the customary price of respondent's paint is $6.98 per gallon, irrespective of quantity. In other words, an advertisement which states "Buy One at $6.98, Get One Free," induces buyers to believe that the advertiser has sold—and will sell in the future—at a price of $6.98 per gallon or $13.96 for two gallons. They are, therefore, encouraged to buy for fear that the offer will lapse if they delay, or by the misapprehension that they are able to obtain two gallons today at a price for which they could yesterday have gotten only one.

Some of respondent's advertisements did state clearly that it had always been respondent's policy to sell "two-for-one" and that it intended to continue to do so (R. 200, 201, 203, 204, 213, 216). Most of the advertisements in the record, however, contain no

such explicit announcement (R. 199, 207, 208, 209, 210, 211, 212, 214, 215, 217, 218, 219). Potential buyers who saw only the latter or who, after scanning the advertisements, remembered only the "Buy One, Get One Free" slogan could reasonably assume that "Buy One" meant "Buy One at the Customary Gallon Price." That price was represented by the advertisement to be $6.98, whereas, in fact, the actual per-gallon price since the institution of respondent's business and for the foreseeable future was $3.49.

So far as this implied representation is concerned, respondent is in no different position than if it had begun its operation by selling only two-gallon cans at $6.98. It could not, after having engaged in this policy over a period of years, begin selling paint in single-gallon cans at the two-gallon price and advertising "Buy One, Get One Free." By offering the combination for $6.98 under this slogan it would be falsely suggesting to consumers that the per-gallon price theretofore had been $6.98, instead of $3.49.

Respondent is no better off because it has always sold its two-gallon package in separate cans under a "Buy One, Get One Free" label. The practical effect of its sales policy has been to offer two gallons for $6.98, and to refuse to sell less than two gallons. The representation that the purchaser is "buying one" at $6.98 is, therefore, false. In fact, he is "buying two" at that price—and nothing is being given "free."

B. THE SLOGAN MISLEADINGLY CHARACTERIZES THE SECOND CAN AS "FREE".

While most of respondent's advertisements in this case are, in our view, deceptive for the reason we have just stated—*i.e.*, consumers are induced to believe that they are being given a special offer available for a limited time—this is not their only vice. Even the advertisements which make it entirely clear that respondent has always offered and will continue to offer its paint "two-for-one" are misleading because they misuse the word "free."

In one sense, of course, every difference in price between competitors can be viewed as an opportunity for consumers to obtain something "free." If neighboring fruit vendors *X* and *Y* offer the same quality oranges at 60-cents-per-dozen and 72-cents-per-dozen, respectively, *X* is, in a certain sense, offering two "free" oranges—for the same 60 cents that would buy 10 oranges from *Y*, *X* will provide 12 oranges. Or, for example, the bottler of soda who sells 12 ounces of standard quality for the same price at which his competitor sells 10 might maintain that he is giving 2 ounces "free." But to label these price advantages "free" would be to mislead consumers. The fruit-vendor or soda bottler is really offering his goods cheaper than his competitors; he is not, in the commonly understood sense, offering anything "free." This is because the meaningful standard by which the "free" nature of a combination offer can be measured is the usual price of the "tying" product itself, not the price of a competing product which happens to be of equal quality. For that reason the word "free" carries quite

a different meaning to the ordinary consumer than the words "lower in price" or "cheaper." The latter mean that the consumer must take the manufacturer's or seller's word for the parity of quality; the former means that the commodities whose prices are being compared are, in fact, identical.[4]

The real incentive which respondent offers to purchasers—if its claims regarding its product are true—is that it is able to produce a paint of seven-dollar quality at half the price.[5] Respondent is not offering anything "free" in the sense that it is attaching a benefit at no extra cost to the purchase of its product

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[4] A sophisticated consumer may, of course, distinguish between these uses of the word "free" and discover that the fruit-vendor is really offering nothing more than a cheaper price per unit. This does not, however, justify the use of the word. "The law is not made for the experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 167 (C.A. 7).

[5] In its brief in opposition, respondent quotes from its brief in the court below, in which it acknowledged—"indeed assert[ed]"—that "the public would be led to believe and is entitled to believe from Mary Carter advertising that the price of a single can of Mary Carter paint is a market standard of value, the standard or customary retail price for paint of comparable quality, and that the second can free means that the purchaser is getting double value for his money" (Brief in Opp., p. 17, n. *). In other words, respondent concedes that it would be improper for the producer of paint of three-dollar quality to advertise "second can free" and place a six or seven-dollar price on a single can because the "single-can" price—at least in the paint industry—is a representation as to quality.

at the ordinary price; its product has no ordinary price independent of the challenged offer. The only truthful representation respondent could make (if its assertions regarding its paint are factual) is that its product is cheaper than others of like quality. Such advertising would doubtless be less effective than advertising using the word "free"; consumers might not be willing to accept respondent's word that its paint is actually of seven-dollar quality. But that is the essence of respondent's representation and is the full extent of the benefit which it ostensibly offers to consumers. It is entirely proper, therefore, for the Commission to require respondent to state its representation accurately rather than mislead consumers into believing that something is being given "free."

Respondent's defense to the charge of misrepresentation—which is the same as the justification given in its advertisements for not cutting its price in half (R. 200, 201, 203, 204)—demonstrates that the only *bona fide* incentive it offers to purchasers is the low price of its paint compared with paint of similar quality produced by others. Respondent contends that it seeks to communicate to the public the fact that its product is equal in quality to seven-dollar paint, and that this can be done only by charging $6.98 for a one-gallon can. See Brief in Opposition, pp. 16-17 and note *. If it is not to mislead consumers, however, respondent's choice is either to charge $6.98 for each gallon (with no "free" offer) or to charge half the price and use other means to persuade the public that its paint is of seven-dollar quality. By labeling one

of every two cans "free" it does what the fruit-vendor does in our illustration at p. 12, *supra*—it transforms a simple competitive price advantage into a more attractive-sounding "free premium" offer.[6]

The fact that respondent refuses to sell a single gallon for less than $6.98 does not make its slogan accurate.[7] First, we submit that the $6.98 price for a single gallon is, under these circumstances, a mere artifice. Although respondent packages its paint in gallon containers, its sales policy is really no different than if it sold paint in two-gallon cans. The purchaser who wanted only one gallon might, of course, throw away the additional gallon, just as the purchaser under respondent's policy may reject the "free" can. Second, the fact that the "tying" product of a combination package sells alone at the same price as the combination *while the offer is outstanding* does not, *ipso facto*, make the "tied" product "free." If that were true, the Commission would be powerless

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[6] Moreover, there is an added subtle misrepresentation in the seven-dollar price under these circumstances. It suggests to consumers that respondent's paint is not only of seven-dollar quality but does actually sell for seven dollars. Consumers who judge paint by price will be more likely to buy paint which sells at seven dollars than that which is reputed to be of seven-dollar quality. Actually, of course, respondent's paint has never sold for seven dollars per gallon.

[7] Respondent does, of course, by the terms of the same offer, sell a gallon for $4.50 if it is bought in quart cans. (Two quarts may be purchased at $2.25 each, and two quarts would then be added free.) But this is not, in our view, the heart of respondent's deception. Even if the quart offer were eliminated, respondent still would be engaged in deceptive advertising.

to deal even with those situations which respondent apparently admits to be deceptive. If, for example, in violation of the rules set down in the *Black* decision, *supra*, a toothbrush manufacturer raises his usual price from 49 cents to 59 cents and regularly offers a small tube of toothpaste "free," he should not be able to defend against a charge that the advertisement is deceptive by showing that a consumer cannot —after the offer has gone into effect—purchase that toothbrush separately for less than 59 cents. The critical question is what the ordinary or usual price was for the brush *before* the offer was made. Respondent's paint had no such price, and the price for which it sold for the duration of the offer could not establish that necessary element.

Respondent's representation here is essentially the same as the representation in *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, that an encyclopedia was being offered "free" with the purchase of a supplement. In the *Standard Education* case this Court held that practice deceptive (302 U.S. at 116-117):

> The practice of promising free books where no free books were intended to be given, and the practice of deceiving unwary purchasers into the false belief that loose-leaf supplements alone sell for $69.50, when in reality both books and supplement regularly sell for $69.50, are practices contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth. It was clearly

> the practice of respondents through their agents, in accordance with a well matured plan, to mislead customers into the belief that they were given an encyclopedia, and that they paid only for the loose-leaf supplement. * * *

Here, as in *Standard Education*, it was respondent's practice "to mislead customers into the belief that they were given" a one-gallon can of paint, and "that they paid only for" the other gallon.[8] In fact, they paid for two gallons of paint at respondent's customary two-gallon price. If, as respondent contends, that price was half of what paint of similar quality was selling for, respondent's obigation under Section 5 was to publicize that fact without misleadingly relying upon the suggestion that something was being given away for nothing.

The practice of calling a premium "free" when it is, in fact, part of a package which the manufacturer or distributor has always offered for sale and intends to continue to offer for sale in combination form is particularly unwarranted when the "tying" commodity and the "free" premium are the identical product. If respondent had offered a "free" brush with every can of paint and intended always to continue

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[8] Decisions of courts of appeals which have followed *Standard Education* and are in point here are *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7 (C.A. 2); *Basic Books, Inc.* v. *Federal Trade Commission*, 276 F. 2d 718 (C.A. 7), affirming 56 F.T.C. 69. *Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654 (C.A. 7), certiorari denied, 352 U.S. 1025, involved a representation that a photograph album was given away with the purchase of ten photograph certificates.

doing so, the Commission might still—for the reasons stated above—consider the advertisement deceptive.[9] But that would be a more difficult case than the present one. For when the premium consists of an added quantity of the same product being sold, respondent has available more truthful means of conveying the message that its offer is cheaper than to call some of its product "free"; it can simply charge less per can.

By holding respondent's advertisement in the present case to be deceptive, the Commission did not, by any means, inhibit use of the word "free" when that word fairly describes what the seller is offering. When the "tying" product has, or is expected to have,[10] an ordinary and usual sale price separate and apart from the "tied" product, a premium or bonus which is offered, for a limited time or to a limited class of purchasers in a package which sells at the same price can fairly be characterized as "free."[11]

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[9] See, *e.g.*, *Tenax, Inc.*, 60 F.T.C. 613 ("free" gift offered with purchase of freezer).

[10] A "free" offer might be made for a limited time as a means of introducing a new product. If, for example, a new toothbrush to retail at 59 cents were to be introduced, it might be permissible to offer a "free" tube of toothpaste for purchasers during the first month or two in which the brush is sold. This would be permissible, however, only if the brush *will* retail at the combination price and the offer will be outstanding for a limited time.

[11] This is the basis for the Commission's decision in the *Black* case, *supra*, and in *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778, where it sustained use of the word "free." The books sold in those cases had fixed standard prices for which

Indeed, if the seller offers an additional quantity of the same product in a "special limited-time" package, that, too, might fairly be described as a "free" offer. But when, as here, the "tying" product has no independent ordinary price, it cannot fairly be sold in a large quantity under the illusion that half is being sold and half is being given away.

The Commission's finding that respondent's advertising was deceptive in this case simply put respondent, which had devised this sales technique at the inception of its operations, on a par with its competitors. Other paint companies which have sold their product for $3.49 or thereabouts are prohibited by the *Black* rules from raising their prices to $6.98 and offering "two-for-one" or "Buy One, Get One Free." Respondent should be in the same position because it has effectively been selling its paint at $3.49 per gallon through its consistent "two-for-one" offer.

Finally, this is a case, like *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, where the Commission's conclusion regarding the deceptive nature of the advertisement is entitled to great weight. This Court observed in the *Colgate-Palmolive* case (380 U.S. at 385) that "as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than

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they were generally available. Hence any additional books offered by the respondents to new members were being given "free" in the sense that the purchasers were being asked to pay no more than they would have paid had they bought the books from the same seller apart from the offer. See pp. 27-29, *infra*.

are courts to determine when a practice is 'deceptive' within the meaning of the Act." The Court further observed that the rule that the Commission's determination is to be respected by reviewing courts "is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment." *Ibid.*[13] The court of appeals erred in this case in failing to consider the respects in which respondent's advertising was misleading and in failing to give due weight to the Commission's determination that it violated Section 5.

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[13] The Fifth Circuit recently stated the proper standards for review in *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F. 2d 523, 528:

> First, in considering the Commission's findings and order, the reviewing court must recognize certain fundamental principles. "The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission." Kalwajtys v. F.T.C., 7 Cir., 1956, 237 F.2d 654, cert. den'd, 1957, 352 U.S. 1025, 77 S. Ct. 591, 1 L. Ed. 2d 597. It is the Commission's function to find these facts and a court should not disturb its determination unless the finding is arbitrary or clearly wrong. Kalwajtys v. F.T.C.; Gulf Oil Corp. v. F.T.C., 5 Cir., 1945, 150 F. 2d 106, 108. Furthermore, the Commission may draw its own inferences from the advertisement and need not depend on testimony or exhibits (aside from the advertisements themselves) introduced into the record. New Amer. Library of World Literature v. F.T.C., 2 Cir., 1954, 213 F.2d 143; see Zenith Radio Corp. v. F.T.C., 7 Cir., 1944, 143 F.2d 29. The Commission need not confine itself to the literal meaning of the words used but may look to the overall impact of the entire commercial.

II

THE COMMISSION ADEQUATELY EXPLAINED WHY IT CONSIDERED RESPONDENT'S ADVERTISING DECEPTIVE

The court of appeals was of the opinion that the Commission had failed to explain what was unfair or deceptive about respondent's advertising (R. 242), and respondent has also urged in this Court that the Commission's opinion was deficient in this regard (Brief in Opp., p. 15)—a view shared by the dissenting Commissioner (R. 64). A complete reading of the Commission's opinion demonstrates, however, that the Commission stated the legal standard which it applies in cases of this sort and that it explained why respondent's advertising did not qualify under this standard. Since the opinion was cast in terms of the arguments respondent made before the Commission, it did not (and could not be expected to) consider some of the underlying premises—which we have discussed at pages 10-20, *supra*—regarding the deceptive nature of this form of advertising.

After stating the undisputed facts, the Commission's opinion (R. 40-49) noted that respondent had "taken numerous exceptions to the hearing examiner's findings, conclusions and order" and observed that the "principal contention" made was "that the hearing examiner erred in concluding that Mary Carter's advertising was not proper under the so-called 'free rule' enunciated by the Commission in the Black decision." (R. 41). The opinion then traced the development of the *Black* rule and concluded that a "necessary corollary" of that decision "is that a person

can offer as 'free' an article which may be obtained upon the purchase of another article only if the article required to be purchased has an established market price" (R. 44-45). This rule, the Commission observed, was incorporated into its 1958 Guides Against Deceptive Prices, which condemned "two-for-one" sales "unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business." A "Note" to this rule, also quoted by the Commission in its opinion, permitted "two-for-one" sales by a newcomer if the advertised price was the same as "the usual and customary retail price of the single article in the trade area, or areas, where the claim is made." The opinion "emphasized" that this rule authorizing "two-for-one" sales by newcomers "refer[s] to the price charged by other retailers for the Specific article offered for sale by the person making the 'two for the price of one' claim * * *, and not to a similar or comparable article" (R. 45).

This portion of the Commission's opinion discloses quite clearly, we believe, that the Commission considers use of the word "free" to be deceptive in any situation other than one involving a product having an independent "usual and customary retail price"; it is not enough if similar products of like quality have an established price in the area. It is true that the opinion did not elaborate the Commission's reasons for distinguishing between products having a "usual and customary" price and those which have no such established sales price. But the Commission

was concerned with respondent's contention that its advertisement was permissible by the standards announced in *Black*, and it sufficed, for purposes of this argument, to distinguish the *Black* rules as relevant only to products having a "usual and customary" price.

Indeed, although the remaining portion of the Commission's opinion—which was devoted primarily to establishing that respondent's paint had no ordinary or usual price other than two gallons for $6.98—did not explicitly focus upon the nature of the misrepresentation involved here, the Commission in various statements made in the course of the opinion adverted to what it considered deceptive. One instance was the Commission's observation that, "under the circumstances, respondents could not, for example, change their advertising to read 'usually and regularly $6.98 per gallon—now two gallons for $6.98' " (R. 46). This was, as we have explained at pp. 10-11 *supra*, the implied representation in respondent's slogan—that when the offer would lapse (or before it was ever made) respondent's paint would sell regularly for $6.98 per gallon. The Commission's conclusion that the $6.98 price per single can "has, in fact, been the usual and regular price of two cans of such paint, and not one, as represented" (R. 48) also focuses upon this misrepresentation and suggests the alternative ground discussed at pp. 12-20, *supra*—that respondent is engaged in unfair conduct because it disguises a lower price as a "free" offer.

This is not a case, as were *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S.

438, and *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, in which the reasons for the agency's order and the grounds upon which it exercised expert discretion are inadequately articulated for judicial review. This decision of the Commission, in light of its earlier cases (see pp. 25-33, *infra*), clearly draws the line between what is permissible and what is impermissible, and the reasons for treating the latter as prohibited are implied in the present opinion and are spelled out more fully in the Commission's precedents. The Commission has unequivocally indicated in the present opinion and in its Guides Against Deceptive Pricing that it would consider deceptive any "free" combination offer by a newcomer unless the identical "tying" product were being sold in the area at an "ordinary and usual price" which did not exceed the combination price.[13] As this Court observed in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385: "[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction." No further clarification by the Commission is necessary or desirable for this task.

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[13] By "identical" the Commission means a product which is identical in every respect, including brand name. It is not sufficient to show that a product with the same physical characteristics, albeit under a different brand, has been selling at an established price. That would only prove that the offeror was providing a competitively lower price for a product of equal quality.

III

THE DECISION IN THIS CASE IS CONSISTENT WITH THE COMMISSION'S PRECEDENTS AND ITS ANNOUNCED RULES

Respondent contended successfully in the court of appeals that the Commission's decision in the present case amounted to a departure from rules which the agency had announced in previous decisions and published guides. A majority of the court of appeals, in addition to finding no deception in respondent's advertising, reversed the Commission's order on the ground that the decision in the present case was inconsistent with *Walter J. Black, Inc.*, 50 F.T.C. 225, and *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778 (R. 243). Judge Brown concurred with the majority's result on this ground alone (R. 247-248). We submit that there is no merit to the assertion that this decision conflicted with Commission precedents and that, for reasons which the Commission itself elaborated, the present case is distinguishable from the *Black* and *Book-of-the-Month Club* decisions. Indeed, Commission decisions since the *Black* case support the result reached here and demonstrate that the rules announced in *Black* were not intended to apply to a situation in which a product has no ordinary and usual price.

In *Walter J. Black, Inc., supra*, which was decided in 1953, the Commission reviewed the problem of the use of the word "free" in advertising. It took as its major premise the following paragraph from the government's brief in this Court in *Federal Trade Com-*

mission v. *Standard Education Society*, 302 U.S. 112 (50 F.T.C. 225, 234-235):

> When such an offer of a gift is made, the customer understands from the use of the word "gift" that an article is to be received without any payment being made for it. If he is told that it is to be received "Free of Charge" if another article is purchased, the word "free" causes him to understand that he is paying nothing for that article and *only the usual price for the other*. If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge. [Emphasis added.]

The Commission went on to say that the "essence of this opinion is that there must be truth in advertising to support the use of the word 'free.' If an advertiser either lies as to the facts or tells only part of the truth in his advertising, and such lies or omissions have the tendency or capacity to mislead or deceive the public, this Commission * * * must inhibit such use of the word 'free' in advertising."

The Commission then addressed itself to circumstances in which the use of the word "free" would be unfair. It said that the Commission would consider use of that word "or any other word or words of similar import or meaning * * * to be an unfair or deceptive act or practice" (1) if all the conditions for receipt of the "free" article were not clearly and conspicuously explained and (2) if the offeror increased the ordinary and usual price of the article required to be purchased in order to obtain the "free" article, or

reduced the former's quality or quantity. 50 F.T.C. at 235-236.

On the basis of these announced standards the Commission dismissed the complaint against the respondent in that case. The respondent involved in *Black* had offered "free" books to the public, whose membership in its two book clubs was being solicited. At the time of the Commission's decision, neither club required its members to commit themselves to purchase any minimum number of books in order to qualify for the "free" offer, but one of the clubs had, prior to 1951, required new members to purchase four books during their first year (50 F.T.C. 229). The price of volumes to members was uniform and books were sold to new and old members at the same price.

The facts of the *Black* case as well as the announced grounds of decision demonstrate convincingly that the Commission was concerned only with a situation in which a seller had been marketing an article at a standard, ordinary or usual price and wished to offer a "free" bonus for a limited time or to a limited group of people (*i.e.*, new members). The announced rules in that case were not intended to cover the entire field of "free" advertising; the Commission neither impliedly nor expressly suggested that it was sanctioning use of the word "free" in every conceivable circumstance not covered by its two categories. Indeed, the assumption underlying the second of the Commission's categories was that "the article of merchandise required to be purchased" had an independent "ordinary and usual price" and that it was separately available at an "ordinary and usual" quality and quantity.

The same was true of the second *Book-of-the-Month Club* decision. The Commission had, in the first Book-of-the-Month Club decision, found that it was impermissible for the respondent in that case to use the word "free" in connection with its introductory offer to new members.[14] The second decision modified the earlier order so that, consistently with the *Black* case, such an offer could be made if the enrollment conditions were specifically stated and the club's prices were not raised for purposes of that offer. It is true that the Commission's opinion appeared to say that the word "free" could be used if the two *Black* rules were satisfied (50 F.T.C. at 781), but we believe that statement must be read, in light of the case before the Commission, to refer only to situations in which there is an "ordinary and usual price" for the tying product.[15]

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[14] The Commission had dismissed the complaint insofar as it charged that the club had engaged in deceptive advertising in reference to the third book which it offered for every two purchased as a "book dividend." See 48 F.T.C. 1297, 1306.

[15] On December 3, 1953, the Commission issued the following policy statement (4 CCH Trade Reg. Rep. ¶ 40,210):

> In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word "free," or any other word or words of similar import, in advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:
>
> (1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave

In its opinion in the present case, the Commission distinguished the *Black* and *Book-of-the-Month Club* cases on the ground that they applied "only if the article required to be purchased has an established market price" (R. 44-45). The Commission noted that the books sold as "tying" products in those cases were offered at standard prices which were "no more than the publisher's set price" (R. 47-48). In short, the Commission held that the *Black* rules were not meant to apply to cases such as this one—in which the "tying" product has no ordinary or usual independent price.

Commission decisions rendered shortly after *Black* indicate that the agency did not, by announcing the rules set out in *Black*, intend to decide cases such as the present one. Two months after *Black* was decided, the Commission issued its decision in *Puro Co.*, 50 F.T.C. 454, which involved facts very close to those in this case. The respondent in *Puro* sold its product

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no reasonable probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

(2) When, with respect to any article of merchandise required to be purchased in order to obtain the "free" article or service, the offerer (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof.

(NOTE: The disclosure required by subsection (1) of this rule shall appear in close conjunction with the word "free" (or other word or words of similar import) wherever such word first appears in each advertisement or offer. A disclosure in the form of a footnote, to which reference is made by use of an asterisk or other symbol placed next ot the word "free" will not be regarded as compliance.)

(a water softening cleanser) under a "Buy One—Get One Free" slogan. It priced a single package at 25 cents and included in each package a coupon entitling the purchaser to a "free" package. The Commission held that the representation was deceptive (50 F.T.C. at 458):

> * * * Although respondent claims that the retail customer was not paying 25 cents for *two* packages but was only paying for *one* package and receiving the other one *"free,"* this self-serving claim has no support in the record but merely reflects the false illusion which respondent sought to maintain in his advertising. * * *

The Commission did not refer to its recent *Black* decision, and it is a fair inference that it believed *Black* to be inapplicable.

Several years later, in *Ray S. Kalwajtys*, 52 F.T.C. 721, affirmed, 237 F. 2d 654 (C.A. 7), certiorari denied, 352 U.S. 1025, the Commission again had before it a case where one item of several always sold together in combination was advertised as "free." The Commission said (52 F.T.C. at 729):

> It is respondents' claim that the album was given free and that the $39.95 was for the making of the pictures. * * *
>
> The hearing examiner decided that, in actuality, the albums were not given free, that respondents' charge was in large part the price of the album, which, accordingly was not in fact free.
>
> With this conclusion, we agree. * * * The transaction did not involve a gift of the album as that term is commonly understood. Instead, it

> was a sale for $39.95 of one album, plus certain contract rights set out in the certificate

See also *International Association of Photographers*, 52 F.T.C. 1450, and *American Albums, Inc.*, 53 F.T.C. 913.

If there was any doubt remaining with respect to the Commission's policy on offers of the sort involved here (*i.e.*, where the "tying" product has no usual independent price), it was put to rest by Guide V, of the Commission's Guides Against Deceptive Pricing (23 F.R. 7965). The Guide, which was adopted in October 1958 and was still in effect at the time of the Commission's opinion provided:

> No statement or representation of an offer to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business.
>
> (Note: Where the one responsible for a "two for the price of one" claim has not previously sold the article and/or articles the propriety of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made.)

As the Commission observed in its opinion in this case (R. 45), the "Note" explicitly provides that a newcomer (such as respondent was when it instituted and continued its sales policy) may offer "two-for-one" only if the *identical* product is being offered at

the advertised price by others. The suggestion that something is being given away is not permissible under this Guide when, as in the paint industry, there are wide variations in the quality of the products being offered by different sellers. In these circumstances, a newcomer cannot say that he is selling the same article at the "customary retail price" set by others; he may claim only that he is selling goods of comparable quality. The "Note" contemplates use of the word "free" in situations where a newcomer offers a specific product which he has not handled before, but which others in the area have sold. If, for example, a gasoline filling station were to commence handling a brand of tires it had not theretofore carried, it might offer "two-for-one" if it set the combination price no higher than the price at which its competitors sell one of the tires.[16]

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[16] Guide IV of the Commission's current Guides Against Deceptive Pricing, which became effective January 8, 1964, provides (29 F. R. 180):

> "Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or ½ free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is important, therefore, that where

The Commission's cases and published "Guides" adequately put sellers on notice that the rules announced in *Black* were not intended to exhaust the range of possibilities in which the Commission might find the word "free" to be deceptive. The present decision is neither inconsistent with earlier cases nor did it unfairly depart from principles on which respondent was entitled to rely. On the contrary, the history of the Commission's consideration of the problem gave respondent ample notice that its practice would be considered deceptive.

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such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset."

This Guide, like the prior Guide V discussed in the text, rests upon the basic premise that it is deceptive to misrepresent, explicitly or impliedly, that the selling price in connection with which the "free" item is offered is the "price usually offered by the advertiser."

CONCLUSION

The Commission acted well within its statutory authority in prohibiting the practice of representing that one can of paint regularly sells for a stated price and a second can is given free when, in fact, both cans are usually and regularly sold for that stated price. The judgment of the court of appeals should, therefore, be reversed.[17]

Respectfully submitted.

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[17] If the Court upholds the Commission's position on the merits, the Commission believes that it would be appropriate to remand the case to it for clarification of its order.

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